HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting)

(Chapter VIII Rule 32 (2)(b)

Description of the case.

W.P. No. 1443 (S/B) year 2002

Gopal Singh S/o Jaimal Singh

Versus

State of Uttaranchal & another

Approved for reporting.

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~~Not approved for reporting~~

Date of decision. 11.11.2003

Initial of Judge

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL.

RESERVED

Writ petition No. 1443 (S/B) 2002

Gopal Singh S/o Jaimal Singh. ---- Petitioner

Vs.

State of Uttaranchal,
Through Secretary, Education,
Civil Secretariat Dehradun and another. ---- Respondents.

Mr. Anil Kumar Joshi, counsel for the petitioner,
Learned Standing Counsel for respondent.

Judgment Dated: November 11, 2003:

Hon'ble Rajesh Tandon, J.

Heard Sri Anil Kumar Joshi, learned counsel for the petitioner and learned Standing Counsel for the respondents.

By this writ petition, the petitioner has prayed for the issue of a writ, order or direction in the nature of mandamus commanding the respondents to pay the pension and post retrial benefits to the petitioner with arrears of the post retrial benefit from October 2001 till the date of actual payment with interest.

Factual aspect of the case

Brief facts giving arise to the writ petition are that the petitioner who was in Indian Army and after retirement he was appointed as Chokidar in Govt. Girls Inter College, Sultanpur patti, U.S. Nagar on 28.12.1985.

On 19th May 2001 the petitioner fell from the roof of College Building and got serious injuries.

In the month of October, 2001 the petitioner was informed that he has been retired on reaching the age of superannuation.

Counsel for the petitioner has submitted that he has requested the College Authorities to pay his retrial benefits but despite making regular requests no step has been taken by them. In response to the legal notice sent by the petitioner the Principal Govt. Girls Inter College, Sultanpur Patti through his letter addressed to the D.I.O.S. dated 4.5.2002 (annexure 1 to the writ petition) submitted that the age

of superannuation of the petitioner is 58 years, however the petitioner worked upto the age of 60 years. So, without recovery of the pay for excess period, the pension cannot be allowed to the petitioner.

Counsel for the petitioner stated in paragraph-11 of the writ petition, it reads as under:-

"That in response of the said query the principal Government Girls Inter College Sultanpur Patti wrote a letter to the District Inspector of School on 4.5.2002 statement that the age of superannuating of the petitioner who upto the age of 58 years however he worked upto the age of 60 years. So without recovery of the pay for excess period the pension cannot be allowed to the petitioner. The photocopy of the letter dated 4.5.2002 is being filed herewith as Annexure No.1 too this petitioner."

Counsel for the petitioner has stated that it is the duty of the employer to fix the date of superannuation as per the service rules and retire him on due date but they cannot shift this burden upon the employee. The respondent, therefore, cannot deny retrial benefits to the petitioner after his retirement. The petitioner has served for the entire period, therefore, the respondents have no right to recover the salary from the petitioner.

In the counter affidavit, the appointment of the petitioner as a retired Army personal is admitted by the respondents. So far as the two years more service of the petitioner is concerned, it is submitted that the petitioner has served two years more service against the rules of service because he was employed in 1985 and those who joined service on 1985, their superannuation age is 58 years, but the petitioner retired on completing the age of 60 years. The petitioner has received two years more pay & salary. The respondents in paragraph-9 of the counter affidavit as under:-

"That the contents of para 12 of the writ petition are denied, it is stated that the petitioner has served two years more against the rules, inspite of having knowledge about his superannuation retirement dated & years. It is further stated that the petitioner was to retire on 30.09.99 and his total dues of gratuity leave encashment group insurance G.P.F. on 30.09.99, 91,345/- whereas petitioner has drawn total Rs. 1,13,724/- for two years excess service w.e.f. 1.10.99 to 30.09.2001, and on same matter respondents are working how to make recovery and settle the problem of how to decide the pension etc. The copy of chart, showing the dues of petitioner and the payment

etc. drawn by petitioner in excess two years and annexed herewith and marked as Annexure No. C.A.-3 to this affidavit."

Learned counsel for the petitioner has contended that it is the duty of the employer to fix the date of superannuation as per the service rules and retire the employee on due date but they cannot fix this burden upon the employee. The respondents cannot deny the retrial benefits to the petitioner after his retirement for their own mistake.

Pension and gratuity is no longer a bounty.

Learned counsel for the petitioner has relied upon in 1985 (1) S.C.C. State of Kerala and other Vs. M. Padmanabhan Nair in which the Hon'ble Supreme Court has held that pension is a valuable rights and property in their hands which the petitioner has right to claim by virtue of the continuous services rendered by them. The observations are quoted below:-

"Pension and gratuity are no longer any bounty to be distributed by the Government to its employees on their retirement but have become, under the decisions of this Court, valuable rights and property in their hands and any culpable delay in settlement and disbursement thereof must be visited with the penalty of payment of interest at the current market rate till actual payment.

The aforesaid judgment of the Apex Court has also been followed in JT 1999 (2) SC 359 Dr. Uma Agarwal Vs. State of U.P. & another and has held as under:-

"Now-a-days, several writ petitions are being filed in this court and various High Courts seeking relief for disbursement, of retrial benefits, because of inordinate delays in payment of these benefits. As Krishna Iyer J. stated in State of Mysore Vs. C.R. Sheshadri & others (1974(4) S.C.C. 308), a retired government official is sensitive to delay in drawing monetary benefits. And to avoid posthumous satisfaction of the pecuniary expectation of the superannuated public servant-not unusual in government, it is becoming necessary to issue directions, in several cases, for early payment of these dues. In yet another case in State of Kerala and others Vs. M. Padmanabhan Nair (1985 (1) SCC 429 this court had occasion to point out that usually 'the delay occurs by reason of non-production of the L.P.C. (Usually the delay occurs by reason of non-production of the L.P.C. (last pay certificate) and the N.L.C. (no liability certificate) from the concerned Departments but both these documents pertain to matters, records whereof would be with the concerned Government Departments. Since

the date of retirement of every Government servant is very much known in advance we fail to appreciate why the process of collecting the requisite information and issuance of these two documents should not be completed at least a week before the date of retirement so that the payment of gratuity amount could be made to the Government servant on the date he retires or on the following day and pension at the expiry of the following month. The necessity for prompt payment of the retirement dues to a Government servant immediately after his retirement cannot be over-emphasised and it would not be unreasonable to direct that the liability to pay penal interest on these dues at the current market rate should commerce at the expiry of two months from the date of retirement."

In R. Kapur Vs. Director of Inspection (Painting and publication) Income Tax and another, reported in (1994) 6 Supreme Court Cases 589 the Apex Court after relying the judgment of the Apex Court in State of Kerala Vs. M. Madmanabhan Nair 1985 (1) S.C.C. page 429, has held as under:-

"8. In this appeal before us the appellant urges that he would be entitled to 18% interest at least in view of judgment of this Court in State of Kerala Vs. M. Padmanabhan Nair. Relying on this ruling, it is submitted that there is unjustified culpable delay in issuing the No Demand. Certificate. The Tribunal having held that DCRG cannot be withheld because of the pendency of the claim for damages should have awarded interest at the rate of 18% per annum.

……..

10. This court in M. Madmanabhan Nair case has held as under:-

Pension and gratuity are no longer any bounty to be distributed by the Government to its employees on their retirement but have become, under the decisions of this Court, valuable rights and property in their hands and any culpable delay in settlement and disbursement thereof must be visited with the penalty of payment of interest at the current market rate till actual payment."

Whether any recovery can be made from the petitioner in respect of the excess period worked/during the settlement of the pension benefit

In 1995 Supplementary (1) S.C.C. 18 Sahib Ram Vs. State of Haryana and others the Hon'ble Apex Court has held as under:-

"Admittedly the appellant does not possess the required educational qualifications. Under the circumstances the appellant would not be entitled to the relaxation. The Principal erred in granting him the relaxation. Since the date of relaxation the appellant had been paid his salary on the revised scale. However, it is not on account of any misrepresentation made by the appellant that the benefit of the higher pay scale was given to him but by wrong

construction made by the Principal for which the appellant cannot be held to be at fault. Under the circumstances the amount paid till date may not be recovered from the appellant. The principle of equal pay for equal work would not be apply to the scales prescribed by the University Grants Commission. The appeal is allowed partly without any order as to costs."

In 1994 (2) SCC 521 Shyam Babu Kverma and others Vs. Union of India and others the Hon'ble Apex Court has held as under:-

"Although we have held that the petitioners were entitled only to the pay scale of Rs. 330-480 in terms of the commendations of the Third Pay Commission w.e.f. January 1, 1973, and only after the period of 10 years, they become entitled to the pay scale of Rs. 330-560 but as they have received the scale of Rs. 330-560 since 1973 due to no fault of theirs and that scale is being reduced in the year 1984 with effect from January 1, 1973, it shall only be just and proper not to recover any excess amount which has already been paid to them. Accordingly, we direct that no steps should be taken to recover or to adjust any excess amount paid to the petitioners due to the fault of the respondent, the petitioners being in no way responsible for the same."

In Ram Khelawan Pathak Vs. State of U.P. and others reported in 1998 (3) UPLBEC 1954 wherein it has been held that when employee has worked beyond the period of his retirement the residuary period should be treated as fortuitous. His Lordship has relied upon the judgment of Apex Court in S.V. Bhima Bhatta & another Vs. State of Karnataka and others reported in JT 1996 (2) S.C. 236. The observations in the judgment of Ram Khelawan Pathak (supra) is quoted below:-

"In a case where an employee has worked beyond the period of his retirement the residue period should be treated as fortuitous as has been held by Hon'ble Supreme Court in judgment Today 1996 (2) S.C. 236, S.V. Bhima Bhatta and another Vs. State of Karnataka and other. The matter also came to be considered in another case reported in judgment Today 1997 (1) SC 353, Mahmood Hasan and others Vs. State of U.P. and others, where the employees were reverted to a lower post as their promotion was against rule it was held that those who will have to step down on a count of correctional process need not refund the pecuniary or other benefits enjoyed by them for they had actually worked during that period. There is yet another direct authority on the point reported in 1994 (2) SCC 621, Shyam Babu Varma and others Vs. Union of India and others. Din which the Apex court dealing with the similar situation, ruled that since the petitioner received higher pay scale not due to fault or his own, it shall not be just and proper to recover the salary already paid to him. A Division

Bench of this court had the occasion to deal with the similar controversy in 1996 (3) U.P.L.B.E.C. 1840, Harish Chandra Srivastava Vs. State of U.P. and others. In that case also, an order was passed without giving an opportunity to withhold superannuation benefits to the petitioner, who was wrongly promoted and was paid the higher salary. It was observed that the impugned order was liable to be quashed not only on the ground of want of affording reasonable opportunity of being heard to the petitioner but also on the ground that the petitioner cannot be held responsible for securing promotion on the higher scale of pay be misrepresenting the department and, therefore, payment of salary cannot be recovered."

Relying upon the decisions of Apex Court in Deokinandan Prasad Vs. State of Bihar, AIR 1971 SC 1407, Madan Mohan Pathak Vs. Union of India AIR 1978 SC 1407, State of U.P. Vs. Shardul Singh 1970 (1) SCC 108 Poonamal Vs. Union of India AIR 1985 SC 1196, D.S. Nakara Vs. Union of India AIR 1983 SC 138, Salabuddin Mohd. Yunus Vs. State of AP AIR 1984 SC 1985, State of U.P. Vs. Brahm Datt Sharma AIR 1987 SC 943 it has been held in Sushila Bhatnagar Vs. State of U.P. 1998 UPLBEC 2214 the retirement benefits are not a bounty payable on the sweet-will and pleasure of the Govt. and it is a right of the person to receive it under Article 31 (1) of the Constitution of India as well as it is a property under Article 19(1) (f) of the Constitution of India. The observations are quoted below:-

"Retirement benefits is not a bounty payable on the sweet-will and pleasure of the Government and that, on the other hand, the right to pension is a valuable right vesting in a Government servant. The right of the person to receive pension is property under Article 31 (1) and by a mere executive order the State had no power to with-hold the same. Similarly the said claim is also property under Article 19(1) (f) and it is not saved by sub-article (5) of Article 19. Therefore, denial of right to receive person affects the fundamental right of the person under Article 19(1) (f) and 31 (1) of the Constitution. It was so held in case of Deokinandan Prasad Vs. State of Bihar, AIR 1971 SC 1407. In the case of Madan Mohan Pathak Vs. Union of India, AIR 1978 SC 803, the Apex Court had held that property in Article 19, 31 (1) and 31 (2) must have the same connotation and since these are constitutional provisions intended to secure a fundamental right they must receive the widest interpretation and must be held to refer to property of every kind. Property within the meaning of Article 19 (1) (f) and 31 (2) comprises every from of property, tangible or intangible, including debts and choses-in-action such as unpaid accumulation of wages, pension and cash grants. Grant of payment of

retirement benefits are part of the conditions of service which has been so interpreted in the case of State of M.P. Vs. Shardul Singh, 1970 (1) SCC 108. That the expression conditions of service is an expression if wide import. It means all those conditions which regulate the holding of a post by a person right from the time of his appointment till his retirement and even beyond it in matters like pension etc, In the case of Poonamal Vs. Union of India, AIR 1985 SC 1196, it was observed by the Apex Court that pension is not merely a statutory right. It is the fulfillment of a constitutional promise in as much as it partakes the character of public assistance in case of unemployment, old age, disablement or similar other cases of undeserved want. Relevant rules merely make effective the constitutional mandate. Pension is a right not a bounty or gratuitous payment. The payment of pension does not depend upon the discretion of the Government but is governed by the relevant rules and any one entitled to the pension under the rules can claim it as a matter of right. In the case of D.S. Nakara Vs. Union of India, AIR 1983 SC 130: 1983 UPLBEC 378 (SC), the Apex Court had laid down that pension is neither a bounty nor a matter of grace depending upon the sweet-will of the employer, nor an ex-gratia payment. It is a payment for the past service rendered. It is a social welfare measure rendering socio-economic justice to those who in the hey-day of their life ceaselessly toiled for the employer on an assurance that in their old age they would not be left in lurch. Pension as a retirement benefit is in consonance with a furtherance of a goals of the Constitution. The most practical raison denter for pension is the inability to provide for oneself due to old age. It creates a vested right and is governed by the statutory rules. In the case of Salabuddin Mond Yunus Vs. State of A.P., AIR 1984 SC 1905, it was held that right to receive pension is a fundamental right, which can be curtailed only in the manner provided in the Constitution. It was further held that pension is property within the meaning of Article 31 (1) of the Constitution and that it is also a right under Article 19 (1) (f) which could not be restricted even as provided under clause (5) of Article 19 and that clause has no application to the right to receive pension. Pension is not a bounty but a right earned by a Government servant on the basis of length of service, is also so recognized. In the case of State of U.P. Vs. Brahm Dutt Sharma, AIR 1987 SC 943."

The respondents, therefore, are directed to pay the petitioner pension as well as retrial benefits available to him.

So far as excess payment is concerned, no doubt, the petitioner has worked after the date of superannuation continuously and he cannot be at fault as no such notice was given to him for retirement. He was allowed to work regularly.

Accordingly, the writ petition deserves to succeed. The respondents are directed to pay pensionary benefits available to the petitioner within one month from the date of filing certified copy of this order. The arrears of pension may also be paid to the petitioner alongwith interest @ 6% per annum.

Consequently, the writ petition is allowed.

There will be no order as to costs.

(Rajesh Tandon, J.)

NCM: